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ABSTRACT

The section of the Education for All Handicapped Children Act (P.L. 94-142) detailing "appropriate education" as a function of an Individualized Education Program (IEP) regulates a variety of educational considerations. Arguing that the IEP is in fact "the hub of the special education wheel," the authors of this document begin by detailing the program's particulars and reviewing landmark court cases relating to (1) the IEP's content and its involvement in student discipline and (2) the right of handicapped pupils to participate in extracurricular activities. Following sections on the IEP and accountability--including a review of seven categories of "causes of complaints"--and on the expanding concept of educational negligence, definitions and court cases involving each of the possible grounds for claiming malpractice in relation to the IEP are reviewed: (1) negligence, (2) intentional or negligent misrepresentation, (3) breach of contract, and (4) a claim under 42 USC 1983 (constitutional tort). Remaining sections concern problems plaintiffs must address to carry forward a claim involving the IEP--the child's ability to learn, achievement level, classification and placement--and grounds for plaintiff claims. It is concluded that the IEP represents the one facet of P.L. 94-142 most conducive to legal challenges relating to educational malpractice. (JBM)

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IEP's: A GATEWAY FOR LEGAL ENTANGLEMENT

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INTRODUCTION

So far, the federal courts have been unwilling to hold that the Education for All Handicapped Children Act (PL 94-142) itself creates (either directly or by implication) a private remedy for damages. In a recent federal district court case from Connecticut involving a learning disabled child, monetary damages were sought for alleged negligence of a public school board "in failing to implement an appropriate educational program earlier in the plaintiff's school career . . . ."[1] The case, Laughran v. Flanders, offers an excellent example of a dominant judicial attitude that sees issues of teaching methodology and educational priorities (upon which a claim for damages in educational negligence hinges), as not appropriate for resolution by courts of law.

In granting defendant school board's motion to dismiss the damage claim, Chief Judge Clarie offered the following rationale:

> . . . The thrust of federal legislation in the field of special education has been to provide financial assistance to the states, in their effort to provide each one of their handicapped children with an appropriate education. Recognition of a private remedy for damages, as alleged in this instance, would compel these programs to shift their focus. Insulation of school officials from liability would take precedence over the implementation of innovative educational reforms. Recognition of the plaintiff's claim would cause special education programs to suffer, since administrators would balk at implementing new curricula and techniques for fear of exposing themselves to liability should these innovations fail.[2]

Unlike the consistent judicial attitude expressed in litigation involving PL 94-142, some cases concerning Section 504 of the Rehabilitation Act of 1973[3] have received a different judicial review

and interpretation. Hairston v. Drosick offers an excellent example.[4]

A case from West Virginia involving a spina bifida child, Hairston firmly established precedent that Section 504 creates a private cause of action, enforceable through federal court action. The decision offers a precedent to apply in future, similar situations involving Section 504 and possibly where provisions of PL 94-142 are, at the same time, also before the court. The United States Supreme Court's future decision in Camenish v. University of Texas, 616 F(2d) 127 (Fifth Circuit, 1980; cert. granted November 3, 1980) will serve to clarify several issues on point.[5]

It is our opinion that the individualized educational program mandate (IEP) represents the one facet of PL 94-142 most conducive to legal challenge for remedy in the form of money damages. To put it another way, the IEP offers judges some manageable factors to analyze as they attempt to fix blame and seek out fault, if in fact they exist.

PL 94-142

The passage of PL 94-142 (The Education for All Handicapped Children Act)[6] in 1975 ushered in an era of educational rights for handicapped pupils. In spite of this Act's complexity and vastness, most handicapped pupils with learning disabilities and their parents or guardians are primarily concerned with five particular sections: The section dealing with free access to education (1219.4), the section describing what types of conditions constitutes a handicap (121a.5), the section detailing "appropriate education" as a function of an Individualized Education Program (IEP) (121a.340), the section regarding placing students in the Least Restrictive Environment (121a.550), and the section

outlining the pupils and parents due process rights (121a.568) all constitute the body of the substantive issues found in PL 94-142.

As expected, PL 94-142 has fostered numerous law suits throughout the country. In examining this mountain of litigation, it quickly becomes clear that many of these suits concern the development, implementation, and evaluation of the IEP. Indeed, the IEP is the heart of PL 94-142 because it controls not only the goals of the educational program, but also the educational setting (Least Restrictive Environment), the length of the school year, instructional methodology, future evaluations, determination of acceptable progress, and matters concerning discipline and extra-curricular activities. The IEP is, essentially, the hub of the special education wheel. All aspects of the special education program are derived from this written document.

Because of the great importance of this document, several challenges have been made regarding its content, means of development, participants in the development, scope, and status as a legal document. This paper will, hopefully, shed some light on these issues and illuminate the previously shadowed areas.

The Individualized Education Program (IEP)

The particulars of the Individualized Education Program are detailed in sections 121a.340-121a.360 of PL 94-142. The section begins with a short description of what an IEP is:

> As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §121a.341-121a.349.[7]

The act states that each local school division is responsible for initiating and conducting "meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education

program."[8] These meetings are of extremely great importance in the IEP process. At these meetings, evaluation data are reviewed and an appropriate educational program is created for each handicapped child. Section 121a.344 even lists those individuals who are required to attend each IEP meeting.

> (a) General. The public agency shall insure that each meeting includes the following participants:
> (1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.
> (2) The child's teacher.
> (3) One or both of the child's parents, subject to §121a.345.
> (4) The child, where appropriate.
> (5) Other individuals at the discretion of the parent or agency.
> (b) Evaluation personnel. For a handicapped child who has been evaluated for the first time, the public agency shall insure:
> (1) That a member of the evaluation team participates in the meeting; or
> (2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.[9]

It is both interesting and important to note that Part 2 of 121a.344 requires the child's teacher (or teachers) to attend the IEP meetings. Many school divisions are notoriously negligent in doing this. Frequently a classroom teacher is told that a handicapped child will be in her regular classroom and she must accept him. This situation, while failing to meet the letter of the law as required in 121a.344(2), is also creating a grave educational disservice. How can the classroom teacher hope to make progress toward the IEP goals if she is not an active participate in the development of these goals? Also, the child with a learning disability might be arbitrariiy placed (by an administrator or special education supervisor) in a classroom which will be too restrictive or not restrictive enough. Such children frequently

require much specialized instruction requiring close (if not constant) supervision and instruction by the teacher. How can a handicapped child receive this attention in a class with 30 other pupils? PL 94-142 requires an appropriate educational program leading towards progress in as normal a setting as possible (least restrictive environment). However, the key is educational progress--not the setting. The entire purpose of PL 94-142 is to provide the needed educational benefits to handicapped children not to sacrifice educational quality for the adminsitrative advantages of mainstreaming. If the classroom teacher is actively involved in the development of the IEP, she may be able to provide the needed input regarding whether or not her classroom situation is appropriate for various handicapping conditions. This involvement of each of the child's perspective teachers helps inappropriate mainstreaming from taking place. An improperly mainstreamed child will make little educational progress himself and may detract from the education of others.

Content of the IEP

What kinds of things should an IEP contain? Again, the law specifically states the content of IEPs:

> The individualized education program for each child must include:
> (a) A statement of the child's present levels of educational performance;
> (b) A statement of annual goals, including short term instructional objectives;
> (c) A statement of the sepcific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;
> (d) The projected dates for initiation of services and the anticipated duration of the services; and
> (e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.[10]

The IEP should be a written document signed by all the child's prospective teachers, the parents of the child, and any educational specialists and administrators involved in the development process.

The child's progress (or lack of) should be reviewed at least annually and adjustments made to the IEP to provide for increased or furtherance of the educational goals.

Court Cases Concerning the IEP

There have been several interesting court cases relating to IEP content. A recent case from Pennsylvania addresses the issue of the 180 day school year in relationship to the child's need for year long education. Battle v. Commonwealth of Pennsylvania (629 F.2d 269, Third Circuit Court of Appeals, 1980) concerns an administrative policy that "sets a limit of 180 days of instruction per year for all children, handicapped or not."[11] Patricia Sue Battle and four other handicapped children challenged that administrative policy as being in violation of PL 94-142. The federal court immediately identified the critical issue, stating:

> At the center of the controversy in this case is the definition of "free appropriate public education." . . . The individualized educational program (IEP) provides the vehicle for giving content to be required "free appropriate public education."[12]

While the Third Circuit Court recognized the difficulties involved in appropriating funds beyond the 180 day period, the court chose to let the states solve their own policy and fiscal problems.

> Moreover, the decision to establish certain educational objectives for handicapped children profoundly impacts on the allocation of scarce educational resources . . . . We believe that these hard decisions of resource allocation, like the determinations of educational policy are best left to the states . . . .[13]

The court then overturned the lower District Court's decision upholding the 180 day policy:

> We therefore conclude that inflexible application of a 180 day maximum prevents the proper formulation of appropriate educational goals for individual members of the plaintiff class.[14]

Therefore, the United States Third Circuit Court of Appeals ruled that if educational need requires more than the standard 180 day education, the public schools must meet that need regardless of local or state policies concerning a 180 day limit.

A 1979 decision by the Second Circuit Court of Appeals upheld the right of certain mentally handicapped children to be mainstreamed into the regular classroom inspite of the fact that such children were carriers of Serum Hepatitis B.[15] The court found that while this stream of hepatitis could be transmitted by "blood to blood" routes (needle injections, transfusions, et cetera), there was no conclusive evidence that the disease is transmitted orally through saliva. Therefore, the court upheld a lower court's decision requiring the mainstreaming of these children. However, the Second Circuit Court did provide a means for the school board to reopen the case if medical evidence becomes more supportive of their position at some future date.

> In short, the strength of the appellees' evidence and the weakness of the Board's evidence abundantly support the conclusions reached by the District Court. We wish to make clear, however, that the Board is not barred from returning to court at some point in the future when it has evidence to support any plan appropriate to a significant health risk.[16]

Another New York case addressed the concern of providing a sign language interpreter for a deaf student in her regular classroom. Rowley v. Board of Education of the Hendrick Hudson Central School District, Westchester County was decided by a United States District Court in New York in 1980.[17] Amy Rowley sued the school district alleging

that their failure to provide her with a sign language interpreter was in violation of PL 94-142.

This case is significant because the school division attempted to rebut the student's allegations by presenting evidence that Amy was achieving (academically) at a higher rate than her normal peers without the sign language interpreter. The school district claimed that Amy's education was, therefore, completely adequate. However, the district court found the school district's claims erroneous:

> While this evidence firmly establishes that Amy is receiving an "adequate" education, since she performs better than the average child in her class and is advancing easily from grade to grade, it establishes little more. I find that the defendants' emphasis on her academic performance and the suggestion that only academic deficiencies would induce them to provide Amy with an interpreter are based on an erroneous understanding of the law; they ignore the importance of comparing her performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative.[18]

Indeed, the court pondered what attainment Amy might achieve if her energies were totally diverted to academics and not split between academics and the translating process.

> Moreover, Amy's IQ does not represent the full measure of her potential. The defendants' own witnesses have established by their testimony Amy's energy, her intellectual assertiveness, her rapport with her teachers and her interest in learning. These are significant elements of her potential which are not reflected in her IQ but which are undoubtedly reflected in the results of her achievement and other academic tests. It seems likely that much of Amy's energy and eagerness goes into compensating for her handicap; if the need for some of that compensation were eliminated, her energy could be channeled into greater excellence in classroom performance. It is unfair and contrary to law to penalize her for her own efforts and those of her parents, by which she has remained slightly above the median of her class.[19]

Consequently, the district court ruled that the school division must provide a sign language interpreter in Amy's classes. The school division appealed this decision to the Second Circuit Court of Appeals. That court upheld the decision of the district court. However, the

appellate court did seek to restrict the applicability of its decision.

> Finally, we wish to emphasize the narrow scope of our holding. This is not a class action in which the needs of all deaf school children are being determined. The evidence upon which our decision rests is concerned with a particular child, her atypical family, her upbringing and training since birth, and her classroom experience. In short, our decision is limited to the unique facts of this case and is not intended as authority beyond this case.[20]

Student Discipline

The IEP is even involved to a certain degree in the discipline of students. A 1979 case from Indiana addresses the issue of whether or not suspending a pupil for misbehaving violates PL 94-142.[21]

Dennis Doe was attending a school for the mildly mentally handicapped. In October, 1978, the principal of the school suspended Dennis for disciplinary reasons and recommended expulsion. A hearing was held and Dennis was subsequently expelled. Dennis' mother brought suit against the school division alleging violation of PL 94-142.

The United States District Court Judge for the Northern District Indiana ruled that PL 94-142 prohibits the expelling (long-term suspension) of a pupil if the disruption arises from the pupil's handicapping conditions.

> A school which accepts Handicapped Act funds is prohibited from expelling students whose handicaps cause them to be disruptive. The school is allowed only to transfer the disruptive student to an appropriate, more restrictive, environment.[22]

However, the court did uphold the right of the school to suspend or expell pupils whose disruptive behavior is totally unrelated to their handicap.

> But the Handicapped Act does not prohibit all expulsions of disruptive handicapped children. It only prohibits the expulsion of handicapped children who are disruptive because of their handicap. Whether a handicapped child may be expelled because of his disruptive behavior depends on the reason for the disruptive behavior. If the reason is the handicap, the child cannot be expelled. If the reason is not the handicap, the child can be expelled.[23]

Pupils whose handicap contributes to their misbehavior may not be suspended or expelled. However, such pupils may be placed in a more restrictive setting. This disciplinary process should be included in each child's IEP so that all parties concerned understand the appropriate disciplinary procedures. The court in Doe v. Koger also stated that if a more restrictive environment was not possible, then suspension or expulsion may be allowed.

> A disruptive handicapped student may be suspended only if the school is unable to immediately place the student in an appropriate, more restrictive, environment.[24]

Another case which dealt with the same issue is Stuart v. Nappi.[25] In this case, Kathy Stuart, a high school pupil, was gradually being mainstreamed into regular classes. As this process took place, her misbehavior increased. Finally, after Kathy partook in a school-wide disturbance, she was suspended for ten days and recommended for expulsion for the balance of the school year.

The pupil sued in federal district court to keep the school board from conducting an expulsion hearing. The court ruled that Kathy could not be expelled for its educational deprivement could cause irreparable injury.

> The expulsion of handicapped children not only jeopardizes their right to an education in the least restrictive environment, but is inconsistent with the procedures established by the Handicapped Act for changing the placement of disruptive children. The Handicapped Act prescribes a procedure whereby disruptive children are transferred to more restrictive placements when their behavior significantly impairs the education of other children.[26]

The court did, however, state that handicapped pupils are not immune from disciplinary measures and suggested some guidelines in dealing with them.

> It is important that the parameters of this decision are clear. This Court is cognizant of the need for school officials to be vested with ample authority and discretion. It is, therefore, with great reluctance that the Court has intervened in the disciplinary process of Danbury High School. However, this intervention is of a limited nature. Handicapped children are either immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children. Secondly, a PPT (Planning and Placement Team) can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children. The Handicapped Act thereby affords schools with both short-term and long-term methods of dealing with handicapped children who are behavioral problems.[27]

Therefore, in at least two cases dealing with the issue of discipline, the handicapped child's right to an education has been affirmed. Schools are prohibited from taking disciplinary measures against a handicapped pupil if the misbehavior is a result of the handicapping condition. However, schools do have the right to place the misbehaving pupil in a more restrictive setting. Of course, other disciplinary alternatives can be worked out between the educators and the parents during the IEP process.

Extra-Curricular Activities

Do handicapped pupils have the right to participate in extra-curricular activities? This question has been adjudicated by several courts in the United States recently. A typical result of such cases can be illustrated by Doe v. Marshall.[28] In this case, a handicapped (severe psychiatric difficulties) caused John Doe to live with his grandparents rather than with his parents. Consequently, he transferred schools to the division in which his grandparents lived. In spite of the recommendation of John Doe's therapists that his participation in varsity football to be highly therapeutic in nature, the school refused to allow him to

play football citing a Texas restriction regarding John Doe's legal residence. The pupil was qualified in all other respects to play varsity football.

John's parents filed suit against the school division asking the court to enjoin the school from blocking his participation. The U.S. District Court in Galveston ruled that making John ineligible to play football was in violation of PL 94-142.

> In treatment of emotionally disturbed adolescents, it is frequently necessary to have them removed from the home and placed in foster care in order to relieve acute symptoms of emotional illness. The policy allows no exceptions for this valid need as it relates to emotionally handicapped students. Frequently, this removal is done on an informal basis. Here, the family has moved carefully and deliberately and in accordance with the Texas Family Code to secure their son's full legal rights.
>
> In addition, the transfer of (John) was done for therapeutic reasons, with full documentation of (John's) handicap and prescribed treatment. To make (John) ineligible because of his transfer is to make him ineligible because of his treatment for a handicap in violation of 29 U.S.C. 794 (the Handicap Act).[29]

Therefore, John was allowed to play football. Other similar cases establish handicapped pupils' rights to participate in extra-curricular activities if they are qualified to do so.[30] Under no circumstances can a pupil be discriminated against solely because of his/her handicap.[31]

THE IEP AND ACCOUNTABILITY

The issue of accountability regarding the content of the IEP is a hotly contested one at the present time. PL 94-142 addresses this issue in 121a.349:

> Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a) (5), (6); Cong. Rec. at H 7152 (daily ed., July 21, 1975).)

Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this action does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.[32]

There are several very important statements in the above quote. Note that 121a.349 states "Part B of the Act does not require that any agency, teacher, or other person be held accountable if . . ."[33] The Act does not state that an agency or teacher is not accountable. It merely suggests that such agencies and personnel do not necessarily have to be accountable.

The ultimate status of the IEP has not been determined. However, several courts are viewing this written document as a legal contract as provided under state law. Remember, Section 121a.349 does not forbid the IEP from being viewed as a contract; it merely states that federal law does not require such an interpretation. A later section of this paper will address the issue of the contractual status of the IEP.

Generally, the recorded causes of complaints regarding individualized educational programs fall into seven distinct categories. These categories are generally stated as (1) improper committee composition, (2) improper development procedures followed, (3) timelines for development not observed, (4) required portions omitted, (5) included services not provided, (6) implementation delayed, and (7) included services not provided free.

Since the enactment of PL 94-142, the sine gua non role of the IEP has been consistently emphasized by courts of law. Recently, for example, the United States Court of Appeals for the Third Circuit rendered its decision in the Battle case (mentioned previously) which involved a class action challenge to a Pennsylvania statute which set as a limit 180 days of instruction per year for all children, handicapped or not.[34] In finding that statute incompatible with the federal act, the court depicted the IEP as the "heart" of the federal mandate to meet each child's unique needs. Said the Third Circuit Court:

> The IEP is the statutory vehicle for formulating the educational objectives and the educational program for each child. We consider it most persuasive that at this fundamental point in the educational decision making process, the statute requires consideration of each individual child . . . . Moreover, as difficult as it is to define the scope of the "unique needs" which must be met by special education . . ., there can be little doubt that by requiring attention to "unique needs," the Act demands that special education be tailored to the individual.[35]

Hayes and Higgins remind us that not only is the IEP the "cornerstone" of the law and the "management tool" for resources and goals, it is also "one way to document assurance of an appropriate education."[36] Moreover, these authors clearly state that the requirements of PL 94-142 (and the key element of the IEP) make "teachers responsible and accountable for assuring that each handicapped child receive the required special education and related services set forth in the IEP."[37]

Writing two years ago, Hayes and Higgins saw the accountability of teachers as resting on the delivery of education and related services to handicapped children placed in their classrooms. It is our opinion, however, that the standard has changed and thus an eighth cause of complaint category has been established and added to the previously mentioned seven causes. Accountability in the 1980's will be expressed

and measured in terms of "student progress and achievement." The burden will fall squarely on the shoulders of classroom teachers, responsible for implementing IEP's, to show (demonstrate) that children are better for what has been done to, with, and for them. A review of the current case law reveals that parents and other advocates of handicapped children are now insisting that school boards and their teachers have a duty to be accountable for results, as measured by actual student achievement.

Educational Negligence: An Expanding Concept

According to Woods, writing in a recent edition of the Tulsa Law Journal:

> In recent years, increasing public dissatisfaction with this nation's educational systems has stimulated a move to find redress in the courtroom. Frustrated plaintiffs who believe the schools have failed in their duty to educate children have become increasingly aware of the possibility of a legal remedy for their grievances . . . .[38]

Note Woods' language in the preceding quotation. She is not saying that plaintiffs are challenging whether or not school systems have failed to carry out their duty to educate; rather, she suggests that plaintiffs are claiming that school systems "failed in carrying out their duty to educate children."[39] To put it another way, professionals may have carried out their duty to provide an educational opportunity, but have errored in carrying out that duty with detrimental results in student progress or the lack thereof.

In 1974, Vacca composed an article entitled "Educational Malpractice." Published in the University of Richmond Law Review,[40] the purpose of the piece was to demonstrate the legal vulnerability of professionals in public schools to suits for damages in situations where students had suffered actual physical injury. At the time (six years ago), the case

law on point clearly showed that liability for student injury was generally limited to the negligent tort, and to matters resulting in physical injury occurring in certain high risk settings (e.g., science laboratories, vocational education laboratories, gymnasia, and playgrounds).

The current liability arena is gradually expanding to include situations other than physical injury. According to Klein, writing in the Suffolk Law Review:

> . . . Plaintiffs with skill deficiencies due to negligent instruction are seeking to expand that liability to cover their injuries. They are charging educators with educational malpractice--the failure to demonstrate the skill and knowledge of a reasonable educator under similar circumstances. An educational malpractice claim is intended to redress the injuries suffered by serious students--those who have made bona fide efforts to meet the demands of course work and the expectations of school officials, who have been led by annual promotions and graduation to believe that they have, in fact, performed in a satisfactory manner, and who have then discerned that they are grossly undereducated according to the demands of contemporary society.[41]

So far, where this new wave of malpractice litigation has gone forward, states Klein, responsible government bodies (boards of education) and responsible school officials (board members, superintendents and principals) have been named as defendants, and not individual practitioners. In these suits the real issue involves ". . . the cumulative effect of the conduct of educators who fail to assess the needs of students regardless of their performance . . . ."[42] To combat this problem, some states have recently moved to set statewide performance standards for graduation from high school, while other states are moving to establish statewide standards for promotion from grade to grade.

Grounds for Taking Malpractice Actions: Implications for IEP's

Upon what basis or grounds will plaintiffs (in educational malpractice actions) take their complaint? According to Woods, there are

four possible grounds: (1) negligence, (2) intentional or negligent misrepresentation, (3) breach of contract, and (4) a claim under 42 USC 1983 (constitutional tort).[43]

Negligence is never presumed by a court. Negligence must be proven by the preponderance of evidence presented. For a viable cause of action to exist, a plaintiff must bring negligence "home to the defendant." Emerging from the malpractice litigation of the late 1970's[44] is a prevailing practice standard for examining matters of alleged educational misfeasance (improper performance of a lawful act). In future court cases, when attempting to determine the possible presence of any professional blame for a child's lack of educational progress, a judge will most likely ask the following question: "Given all the data regarding this student and his or her deficiences, abilities, problems, and home environment (most often referred to as "cultural diversity"), what should a reasonable and prudent practitioner, with similar training and experience, have done?" A corollary question will then be asked. "Did the practitioner fail to act properly or omit doing something that should have been done?" The answers to these questions will determine the success of plaintiff parent's allegations of professional malpractice.

It is important to note, however, that educational malpractice suits may contain a "more" legitimate cause of action if the suit is brought by more than one injured pupil. As Connors correctly points out in Educational Tort Liability and Malpractice, the Donohue case (on which the more famous Hoffman decision was based) does not totally preclude educational malpractice actions in the future.[45] Indeed, the New York Supreme Court, Appellate Division stated:

> This determination does not mean that educators are not ethically and legally responsible for providing a meaningful public education for the youth of our State. Quite the contrary, all teachers and

> other officials of our schools bear an important public trust and may be held to answer for the failure to faithfully perform their duties. It does mean, however, that they may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives.[46]

The best protection for public school systems and their staffs against potential educational malpractice suits grounded in claims of negligence will come from taking certain preventive steps. For example, early identification of students with skill deficiencies, periodic testing and retesting of such students during their entire school career, early and continued remediation of their deficiencies, open and constant communication with their parents, and competent performances by each and every professional working with these children.

Intentional or negligent misrepresentation states Jorgensen (writing in the Albany Law Review[47]) represents potential causes of action in education. "Misrepresentations of student progress on report cards, in interviews with parents, or in the award of a diploma would evidence a school's wrongdoing."[48] Are teachers, principals, and other professionals being "honest" in their appraisals of children to parents? If not, we believe they are leaving themselves wide open to suit, whatever their intent.

As Woods has concluded based upon her review of the case law on point:

> A student who has been repeatedly promoted and has been reported to be working at or near grade level in basic academic skills should be able to charge the schools with misrepresentation when he discovers after graduation that he is a "functional illiterate." The schools have a responsibility to keep the parents and students accurately informed of the student's progress. Conversely, parents and students have a right to know if they are not meeting standards set by the schools.[49]

What are the typical "indicators of student progress," that parents and kids look to for their perceptions? Grades, test scores, and diplomas

function as the formal and acceptable indicators of student "levels of functioning" in schools. And, "A school . . . which inaccurately represents a student's competence and educational progress," states Woods, "should be held responsible for any damage to the student resulting from reliance on that misrepresentation."[50]

Breach of contract is another possible claim for bringing suit against a school division. In a cause of action grounded in breach of contract, some plaintiffs will most likely rely on compulsory attendance statutes and state regulations describing standards to be met in fulfilling minimal state requirements. Several states now require minimal student achievement on such requirements as a prerequisite for graduation. Others, however, will resort to different arguments to make their case.

Most states have at least five requirements for contractual status.[51] These are:

(1) Offer and Acceptance
(2) Consideration
(3) Legal Subject Matter
(4) Legal Standing of the Parties
(5) Proper Legal Form

Offer and acceptance means that an offer was made by one party and accepted by the other. In the case of the IEP, the school division makes an offer and the parent or guardian accepts this offer by signing or agreeing to the IEP. Consideration is when there is an exchange of goods, services, or money. The school division is providing an educational program which the public (parents) pay for through taxes. The concerns of legal subject matter, legal standings of the signers, and proper legal form present no special problems in contract law.

Therefore, the IEP will meet all the requirements of a legal contract under most state laws. And since Section 121a.349 does not

forbid its interpretation as a contract, some states courts might find it to be a legal contract under state law. This situation could present high levels of accountability for educators.

How can educators protect themselves if the IEP is ruled to be a bona fide, legal contract? First, express the child's projected attainment in broad goals and objectives. Second, have a disclaimer following these goals and objectives stating something like, "The aforementioned goals and objectives are broad attainment guidelines and targets. Neither this school division nor its personnel can guarantee that the pupil will necessarily reach these goals within the prescribed period of time." And third, never promise that the pupil will achieve specific educational objectives. No educator can guarantee that a pupil will be reading on the fifth grade level by the end of the academic year (for example). Educators can guarantee what they will do to help the child reach that objective, but they cannot guarantee the child's performance of reaching the objective.

A decision last year from a New York court might offer a hint of things to come regarding the IEP. In Pietro v. St. Joseph's School, a private school matter, the New York Supreme Court, Suffolk County, heard the complaint of parents who charged that their son was a victim of educational malpractice.[52] The complaint alleged that the boy attended St. Joseph's School from 1970 to 1978 and that the school authorities "failed to ascertain whether the child was capable of learning, failed to evaluate him, failed to provide him with special educational facilities, failed to hire proper personnel, and failed to teach in a manner the child could understand."[53]

Deciding against the parents and their attempt to recover tuition costs, the New York Court said, however, that it could conceive of a

future successful malpractice suit by parents, ". . . if an express agreement had been entered between a parent and a school in which the school contracted that the student would reach a certain proficiency after pursuing certain studies."[54]

It should be kept in mind that a simple definition of contract, states Corbin, is ". . . a promise enforceable at law directly or indirectly."[55] And, states Gee and Sperry, "enforceable promises" may be interpreted to include "the professional services of teachers."[56]

As previously mentioned, the reader should be aware that the USOE final regulations (Section 121a.349) does provide the following comment: "This section is intended to relieve concerns that the individualized educational program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate."[57] This same comment continues, however, that "this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program."[58] It is our belief that this last statement represents a crack in the legal armor.

Breach of warranty may offer a new vehicle for bringing suits in education. Some lawyers are beginning to suggest that breach of warranty, and not breach of contract or breach of civil rights guarantees, will be the claim of plaintiffs in future educational malpractice cases. In breach of warranty actions damages are recoverable for the breach.

Unlike negligence, liability (liability in tort), "'warranty liability' is generally associated with contract liability . . . ."[59] In both, however, the standard of performance will be used to judge the matter.

Technically, a warranty is defined as a promise (obligation imposed

by law) made by one party (expressed or implied) upon which another party may rely.[60] A warranty "implies a contractual relation between the party making the warranty and the beneficiary of the warranty."[61] The promise is based upon factual information and makes certain guarantees regarding the quality and character of the services to be performed.

Thus, questions can be raised concerning inferences drawn by parents from what is implied by those writing and discussing IEP's. Is the notion of warranty contained in the IEP process? We believe that it is.

Constitutional tort action, taken under 42 USC 1983 (the codification of the Civil Rights Act of 1871) represents an alternative action to the ones just reviewed. Lawyers call this a constitutional tort action wherein plaintiffs seek either equitable remedy or remedy in the form of money damages (legal relief) for having been deprived of their constitutional guarantees (Fourteenth Amendment guarantees of both property and liberty) or for being deprived of guarantees and benefits of a federal statute.

The Civil Rights Act of 1871, Section 1983, reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[62]

It should be noted that Section 1983 supercedes any and all sovereign (governmental) immunity which state and local officials may possess.

For example, could a plaintiff claim that "The school's failure to educate would be an alleged confinement without due process of law?" Or, will "A school's power to require student attendance without providing benefits . . . go unchallenged?" Another claim might be

phrased as follows: "Education should prepare a child to enter society as a self-sufficient and self-reliant individual. A system of compulsory education that fails to provide those benefits violates a student's right to educational development."

In our opinion, 42 USC 1983 cannot be taken casually. It may have the most potential for taking public school boards and administrators into court. As Tom Shannon pointed out five years ago:

> . . . Section 1983 is an expanding funnel through which a whole variety of litigation may be brought against public school people.
>
> In a very real sense, Section 1983 can be considered the most significant "malpractice" law for public school people in our nation. As the "malpractice" concept develops further, Section 1983 actions against public school people should proliferate . . . .[63]

A highly probable legal implication of the current "student competency testing" movement, for example, concerns the inevitable consequences of testing all children (exceptional and nonexceptional) using the same tests and evaluative criteria. Also, there are other more serious questions to be asked about testing mainstreamed exceptional children in mathematics and reading. And, what about exceptional children the severity of whose handicap requires the delivery of educational services in a "special setting?"

In the 1980's public school systems cannot refuse to give a student a high school diploma "solely because of a handicap." Nor can they award a handicapped pupil a "piece of paper that creates a stigma." The legal ramifications of federal legislation dealing with the handicapped (1973 Rehabitation Act §504 and PL 94-142 in particular), plus recent court decisions that speak to the concept of "dead end education" are multiple and far reaching.

In Goss v. Lopez, the United States Supreme Court stated emphatically that knowledge and skills to be gained from the education guaranteed by

the state are property entitlements of all children of school age.[64] Thus, as evidenced through the decisions of subsequent courts, any infringement on that right, no matter how slight, must be accompanied by the basic elements of due process of law. As Draba has observed, "It is difficult to imagine a school system that would make graduation conditional upon reading ability without providing careful measures to ensure accuracy and fairness."[65]

Other recent court decisions, especially those concerning the issue of education for handicapped children, have insisted that a child's right to education means more than mere entry to the school. According to McCarthy and Thomas, "Mere school attendance does not assure that educational benefits are accruing to the child."[66] The hard decision that is now faced by educators and judges alike, involves a determination of "the benefits that should accrue to each child in return for mandated attendance."[67]

The most litigious element in today's special education situations is the matter of 'substantial progress." To put it another way, advocates for disabled children are saying: "You have identified the handicap and you have placed the child in an educational program. The big question now becomes one of progress being made by that child, because of what you have done for him or her." A new standard has emerged from past litigation to be applied in future cases, "the education program should leave the person independent and able to make it on his own--within the limits of his handicap."

A recent report (April 16, 1980) of a coalition of advocates for education of the handicapped reported, among other things (based upon a six-month's study in elevent states), that many children are denied "related" services essential to enable them "to benefit from"

their special education program.[68] Note the emphasis placed on "benefit from their program."

In addition, the coalition cited the following "injustices":

(1) Thousands of children remain on waiting lists for evaluation and placement.

(2) Institutionalized children are routinely excluded from any kind of schooling or are denied appropriate services.

(3) Handicapped children are unnecessarily segregated in special schools.

(4) Black children are misclassified as "educable mentally retarded" three times more often than are white children.

(5) Handicapped children are illegally suspended or expelled from school.

(6) Many students in special education classes lack the required individual evaluations and program plans or have "canned" plans.[69]

PROBLEMS IN CARRYING THE ACTION FORWARD

What must a plaintiff (parents or other advocates) do to establish his cause of action? What problems can plaintiff experience in carrying his or her educational malpractice action forward in court. According to Klein there are two such problem areas.[70] First, plaintiff's "ability to learn" (mental capacity to learn) must be established. And second, there must be evidence produced showing the "level of achievement" of plaintiff.

Ability to Learn

> Evidence of mental capacity is a significant element in plaintiff's case because learning ability determines reasonable expectations for instruction and achievement.
>
> Evidence that a pupil has a normal capacity to learn and yet has not achieved functional literacy at least suggests professional incompetence.[71]

One way that plaintiff might show this is "to introduce evidence of progress in a remedial situation begun after leaving the public

schools" (a tactic used in Peter W case).[72] This not only demonstrates that a student possesses ability to learn, but also stresses the "inappropriateness of the instructional decisions made in light of the needs of the individual" (a tactic used in special education cases).[73] Another way to show mental capacity, states Klein, is to introduce evidence of aptitude test results. Such test results, "provide a basis for predicting what a child can learn in an appropriate setting . . . ."[74] The notion of "making progress if the program and setting are appropriate" may launch a new PARC-type, landmark case.[75]

(2) Achievement Level. How does plaintiff establish achievement level? Again, standardized test scores are used. Grade norms are provided. Individual students and groups of similar students are compared.

There is one other possible line of evidence that might be used by lawyers in future cases to establish achievement level--a line of evidence that has definite implications for states mandating statewide student competency tests. In Klein's words:

> Inability to accomplish practical and necessary tasks can also serve as proof of low achievement. Completion of a job application or insurance form, for example, requires skills of comprehension, recall and writing. Proof of deficiencies in practical skills is particularly valuable in an action against a school system that incorporates practical life tasks in its curriculum.[76]

Classification and Placement of Exceptional Children

At one end of the legal challenge continuum are issues associated with denial of entry of handicapped children to an educational opportunity (for example, refusing to let them enter school). At the other end of the continuum are the issues associated with a handicapped child making "substantial progress" in their educational program. Between these two points on the continuum are the issues of (1) classification and diagnosis, and (2) placement.

As required by law, a student must be identified (found), diagnosed, and evaluated before he/she can be placed into a special education program. According to Remz' writing in the Columbia Journal of Law and Social Problems, questions presented in recent court challenges regarding diagnosis and classification have been the following:

> Is the classification of a child overrestrictive? That is, has a child been put in special education who ought not to be there in the first place? A student may be mistakenly identified and classified as having a handicap requiring special education. This situation frequently occurs with students who present discipline problems.
>
> . . . Biased intelligence testing may also cause a student or entire groups of students to be classified as mentally retarded and may result in disproportionate racial groupings.
>
> What about underevaluating a child? . . . An underevaluation of the child's intelligence or learning abilities may result in his exclusion from academic training, although he should rightfully be in a class for the educable mentally retarded.
>
> What about failure to identify a serious handicap? What about the student who should be in a special setting but is left in regular classes? What if his/her handicap is ignored or just goes undetected?[77]

In the issue area of pupil placement (programming), the attention of the court shifts to the appropriateness of the particular special education program into which the school places the individual student. Thus the critical question becomes ". . . what type of educational setting would be suitable for the individual child's needs."[78]

The key to successfully fighting claims of either misclassification or misplacement is the job done by the "evaluation unit," or "placement team." Failure by such a unit or team to perform at acceptable levels can lead to both the school divisions and the placement teams becoming legally vunerable.

GROUNDS FOR PLAINTIFF CLAIMS

According to Remz, typically state statutes do not contain specific provisions authorizing a cause of action for damages resulting from misclassification or misplacement of students. Thus, such court actions are more common law based.

Basically, the misclassification and misplacement actions have been built on one of the following grounds:

Diminution of Educational Opportunity.

> If he is not educated in an appropriate setting, the student may be denied an equal opportunity to the education which is arguably guaranteed him by the state through its constitution, special education states, or both. Where the placement is so inappropriate that learning is futile, the student may, in effect, be completely denied an education.

Loss of Earning Capacity.

> . . . any decision that permanently affects a student's placement and ultimate achievement would determine a student's employment prospects.

In such misclassification and/or misplacement cases, certain questions must be considered if the action is to go forward successfully. These questions are:

(1) How permanent is the special education assignment of the child?

(2) Was the student's academic liberty (freedom to pursue a meaningful education) infringed upon? (In other words, was the child excluded from classes? Excluded from school? Excluded from supportive services?)

(3) Did the classification and placement cause or produce a stigma?[80]

In a claim where the plaintiff alleges that he or she "suffers psychological and emotional damages because he or she is 'different' from the other kids," the issue of stigmatization is usually declared.[81] Always looming in the background is the potential for 42 USC 1983 suits. To Remz, "An action for wrongful placement or failure to identify might

be predicted upon the equal protection clause . . . . A plaintiff might allege any denial of suitable placement to be a denial of equal opportunity of education. When the school district fails to accord a student's parents their statutorily prescribed procedural rights, the parents might allege a denial of their due process rights."[82]

CONCLUDING STATEMENT

The "Individualized Education Program" is the heart of the special educational program particularly in cases of learning disability. The IEP regulates a variety of educational considerations such as the classroom environment of the program, the educational content of the program, the methodology of instruction, the length of the school year, disciplinary matters, and participation in extra-curricular activities.

There has already been a moderate amount of litigation concerning the IEP. Courts at the state and/or federal level have ruled the following:

(1) The length of a school year cannot be restricted to only 180 days for handicapped children.

(2) School divisions must provide sign language interpreter for deaf students who are (appropriately) mainstreamed into regular classrooms even if the student's academic attainment is above that of his peers.

(3) Hard medical evidence is needed to prohibit handicapped children from attending school for contagious medical reasons.

(4) Handicapped pupils may not be disciplined if the basis of their misbehavior results from the handicapping condition. The pupil may be placed in a more restrictive environment, however.

(5) School divisions may not restrict a pupil's participation in extra-curricular activities solely because of a handicap.

The exact legal status of the IEP has not been decided in most states. However, Section 121a.349 neither forbids the interpretation of the IEP as a legal and binding contract by state courts nor requires such an interpretation either.

Most cases which have dealt with PL 94-142, thus far, were more concerned with specific aspects of the IEP rather than the overall issue of educational malpractice. However, there is more than ample legal groundwork to bring an educational malpractice suit against a school division. This "malpractice" action could conceivably take four forms:

(1) Negligence

(2) Intentional Misrepresentation

(3) Breach of Contract, and

(4) A Civil Rights Violation under 42 U.S.C. §1983 (Constitutional Tort).

All of the above possibilities represents a viable cause of action in an educational malpractice suit.

Therefore, we believe that the legal status of the IEP is not absolute and has the very real possibility of evolving into an instrument for legal challenges along the lines of educational malpractice.

END NOTES

[1]470 F. Supp. 110 (D.C. Conn., 1979).

[2]Supra note 1 at 115.

[3]20 U.S.C. 794 (1973).

[4]423 F. Supp. 180 (S.D. W.Va., 1976).

[5]616 F. 2d 127 (Fifth Circuit, 1980) cert. granted November 3, 1980.

[6]Public Law 94-142, 20 U.S.C. §1401-1461.

[7]Supra note 6 at §121a.340.

[8]Id. note 6 at §121a.343.

[9]Id. note 6 at §121a.344.

[10]Id. note 6 at §121a.346.

[11]Battle v. Commonwealth of Pennsylvania, 629 F. 2d 269 (1980), also see Armstrong v. Klein, 376 F. Supp. 583 (D.C. Pa., 1979).

[12]Supra note 11.

[13]Id. note 11.

[14]Id. note 11.

[15]New York State Association for Retarded Children v. Carey, 612 F. 2d 644 (1979).

[16]Supra note 15.

[17]Rowley v. Board of Education of the Hendrick Hudson Central School District, Westchester County, 483 F. Supp. 528 (S.D. New York, 1980).

[18]Supra note 17.

[19]Id. note 17.

[20]Id. note 17, affirmed 632 F. 2d 945 (1980), also see Hairston v. Dresick, 423 F. Supp. 180 (S.D. W.Va., 1976), Tatro v. State, 625 F. 2d 557 (Fifth Circuit, 1980), and Camenish v. University of Texas, 616 F. 2d 127 (Fifth Circuit, 1980).

[21]Doe v. Koger, 480 F. Supp. 225 (N.D. Ind., 1979).

[22]Supra note 21.

[23]Id. note 21.

[24]Id. note 21.

[25]Stuart v. Nappi, 443 F. Supp. 1235 (D.C. Conn., 1978), also see Howard v. Friendship Independent School District, 454 F. Supp. 634 (S.D., Texas, 1978), and Southeast Warren Community School District v. Department of Public Instruction, 285 N.W. 2d 173 (Iowa, 1979).

[26]Supra note 25.

[27]Id. note 25.

[28]Doe v. Marshall, 459 F. Supp. 1190 (S.D. Texas, 1978).

[29]Supra note 28.

[30]Kampmeier v. Harris, 411 N.Y.S. 2d 744 (1978).

[31]Since the U.S. Supreme Court decision in Southeastern Community College v. Davis, 99 S.Ct. 2361 (1979), the phrase "No otherwise qualified handicapped individual" (Section 504 of the 1973 Rehabilitation Act) has been interpreted as: "the person is qualified for the activity despite his or her handicap."

[32]Supra note 6 at s121a.349.

[33]Id. note 6 at 121a.349.

[34]Supra note 11.

[35]Id. note 11.

[36]J. Hayes and S. T. Higgins, "Issues Regarding the IEP: Teachers on the Front Line," Exceptional Children (January, 1978) at 267.

[37]Supra note 36 at 267.

[38]Nancy L. Woods, "Educational Malfeasance: A New Cause of Action for Failure to Educate," 14 Tulsa Law Journal 383 (1978).

[39]Supra note 38.

[40]R. S. Vacca, "Teacher Malpractice," 8 University of Richmond Law Review, 447 (Spring, 1974).

[41]A. J. Klein, "Educational Malpractice: Can the Judiciary Remedy the Grcwing Problem of Functional Illiteracy?" 13 Suffolk Law Review 27 (Winter, 1979).

[42]Supra note 41.

[43]Supra note 38.

[44]Peter W. v. San Francisco Unified School District, 60 C.A. 3d 184, 131 Cal. Rptr. 854 (1976), Donahue v. Copiaque Union Free School District, 407 N.Y.S. 874, 64 A.D. 2d 69 (1978), and Hoffman v. Board of Education of City of New York, 410 N.Y.S. 2d 99, 64 A.D. 2d 369 (1978).

[45]Eugene T. Connors, Educational Tort Liability and Malpractice (Bloomington, Ind.: Phi Delta Kappa, 1981).

[46]Donohue v. Copiaque Union Free School District, 407 N.Y.S. 874, 64 A.D. 2d 69 (1978).

[47]C.A. Jorgenson, "Donohue v. Copiaque Union Free School District: New York Chooses Not to Recognize 'Educational Malpractice,'" 43 Albany Law Review 339 (Winter, 1979).

[48]Supra note 47.

[49]Supra note 38.

[50]Id. note 38.

[51]S. Kern Alexander, Public School Law (St. Paul, Minn.: West Publishing Co., 1980), at 578.

[52]Pietro v. St. Joseph's School, 48 U.S.L.W. 2229 (N.Y. Supreme Court, 1979).

[53]Supra note 52.

[54]Id. note 52.

[55]Corbin on Contracts (1952) in E.G. Gee and D. J. Speery, Education, Law and the Public Schools: A Compendium (Boston, Mass.: Allyn and Bacon, 1978) at C26.

[56]Supra note 55 at 626.

[57]Supra note 32.

[58]Id. note 32.

[59]Words and Phrases, 1980 Cum. Ann. Pock. Part, at 41.

[60]Supra note 59 at 40.

[61]Id. note 59 at 40.

[62]42 U.S.C. §1983.

[63]T. A. Shannon, "The U.S. Civil Rights Act: A New Dimension in the Liability of Public School People," Current Legal Issues in Education (Topeka, Kan.: NOLPE, 1976) at 105.

[64] Goss v. Lopez, 419 U.S. 565 (1975).

[65] R. E. Draba, "Reading Ability as a Graduation Requirement" in Harper and Kilan (eds.) Reading and the Law (Newark, Del.: I.R.A., 1978) at 30.

[66] M. M. McCarthey and S. B. Thomas, "The Right to an Education: New Trends from Special Education Litigation," 7 NOLPE School Law Journal 80 (1977).

[67] Supra note 66.

[68] 1 Department of Education Weekly (April 23, 1980) at 3.

[69] Supra note 68.

[70] Supra note 41.

[71] Id. note 41.

[72] Id. note 41.

[73] Id. note 41.

[74] Id. note 41.

[75] P.A.R.C. v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa., 1971), 343 F. Supp. 279 (E.D. Pa., 1972).

[76] Supra note 41.

[77] S. F. Remz, "Legal Remedies for the Mis-Classification or Wrongful Placement of Educationally Handicapped Children," 14 Columbia Journal of Law and Social Problems 389 (1979) at 392.

[78] Supra note 77 at 396.

[79] Id. note 77 at 400.

[80] Id. note 77 at 424-427.

[81] Id. note 77 at 400.

[82] Id. note 77 at 445.